THE INVESTMENT TREATY ARBITRATION REVIEW

SIXTH EDITION

Editor
Barton Legum

THE LAWREVIEWS

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Barton Legum

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CONTENTS

PREFACE

This year's edition of *The Investment Treaty Arbitration Review*, like that of last year, goes to press under particular circumstances. Measures to contain the covid-19 pandemic around the world have confined many authors to quarters. Despite these constraints, the authors of this volume have delivered their chapters. The result is a new edition providing an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments over the past year.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This sixth edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume under the difficult conditions that continue to prevail today.

Barton Legum
Dentons
Paris
May 2021

Part IV

Substantive Protections

Chapter 21

FAIR AND EQUITABLE TREATMENT

Andre Yeap SC, Kelvin Poon, Matthew Koh, David Isidore Tan, Daniel Ho and Mark Teo[1]

I INTRODUCTION

The fair and equitable treatment (FET) standard in investment protection treaties remains at the core of states' obligations and thus often arises in investor–state disputes. With notable exceptions,[2] particularly in the newer generation of treaties,[3] the FET standard is also often left undefined. Notwithstanding that, tribunals have elaborated on this standard to develop both substantive and procedural principles. This chapter will briefly review the FET standard and how it has been applied in some recent cases.

A survey of the recent cases below suggests varying approaches by tribunals in examining the breach of the FET standard: some prefer to elucidate on specific concepts such as an investor's legitimate expectations and arbitrariness in states' conduct, while others prefer to focus on a factual inquiry premised on the broad concept of unfairness and equity. In seeking to distinguish a case from the next, tribunals also often base their reasons on subtle differences in the wording of the relevant FET provision in treaties, either emphasising the autonomous nature of the FET provision or the provision's reference to other concepts such as the minimum standard of treatment. However, regardless of the precise language used, it is clear that tribunals seek to strike a balance between the legitimate exercise of state powers to legislate and regulate, and the protection of an investor from mistreatment by the host state. In general, tribunals are more ready to come to the aid of the investor where the breach of the FET standard manifests in a lapse in process or a breach of natural justice, eschewing a substantive review of the effects of the measure.

II RECENT CASES ON THE PRINCIPLES OF FET

i AMF v. Czech Republic, Final Award, PCA Case No. 2017-15, 11 May 2020

In 1997, the claimant (a German limited partnership) entered into agreements to purchase two aircraft from, and subsequently lease them back to, Fischer Air s.r.o (founded by Mr Václav Fischer, who was one of the claimant's limited partners). From 2005 to 2006, bankruptcy proceedings were then commenced in the Czech Republic in respect of both Mr Fischer and Fischer Air (which by then had been bought over and renamed Charter Air). The bankruptcy

1 Andre Yeap SC is a senior partner, Kelvin Poon and Matthew Koh are partners, David Isidore Tan is a senior associate, and Daniel Ho and Mark Teo are associates at Rajah & Tann Singapore LLP.

2 See Notes of Interpretation of Certain Chapter 11 Provisions (adopted by the NAFTA Free Trade Commission on 31 July 2001).

3 See Article 9.4 of the Singapore–European Union Free Trade Agreement. See especially footnote 11 of Chapter 9.

trustees included the aircraft in both Mr Fischer's and Charter Air's respective bankruptcy estates. The claimant challenged these inclusions, and the Czech courts eventually concluded that the aircraft were indeed not assets of the various bankruptcy estates. However, by the time these rulings had been rendered, the aircraft had already been sold to forestall further depreciation.

The claimant claimed that there was a breach of, among others, the FET standard under the Germany–Czech bilateral investment treaty (BIT). The tribunal determined that there was no breach, with the claimant-nominated arbitrator Mr Stanimir A Alexandrov dissenting.

The tribunal accepted that a violation of the BIT could, in principle, result cumulatively from the combination of administrative actions and the failure of the judiciary to correct them, even though none of these actions taken in isolation might be sufficient on its own to rise to the level of a treaty breach.[4] The tribunal also accepted that, even though each individual act of the bankruptcy trustees and Czech courts was in compliance with Czech law, the outcome of events was 'objectively unsatisfactory' for the claimant.[5]

The tribunal therefore considered the question to be whether 'fairness' under the FET standard required not only fairness in process (in the sense that the trustees and courts at all times complied with applicable law), but also fairness in effect (in the sense of ensuring that, at the end of the legal proceedings, the claimant would be left in no worse a position than before the proceedings started).[6] The latter would have obliged the Czech Republic to design its legal system in a manner which would have prevented the type of harm sustained by the claimant. The tribunal concluded that they were unable to condemn the Czech Republic for not having done so.[7] The tribunal were unwilling to extend the FET standard to a degree that obliged a state to provide an 'effective remedy' against harms that befall an investor through the normal operation of its laws when the state action was not otherwise wrongful under international law.[8] Although there was language in other treaties that arguably contained such an obligation (e.g., Energy Charter Treaty Article 10(2)), such language was not found in the Germany–Czech BIT.[9]

Issuing a separate declaration, Mr Alexandrov opined that the FET standard had been breached because the conduct of the Czech bankruptcy trustees and courts as a whole resulted in treatment that was unfair, and the failure to provide the claimant an effective remedy for a state's own actions 'cannot be just and equitable'.

ii Ioan Micula, Viorel Micula and others v. Romania, Award, ICSID Case No. ARB/14/29, 5 March 2020

The claimants were in the business of the production and sale of alcoholic spirits and related activities in Romania. They claimed that Romania had breached its FET obligation under Article 2(3) of the Sweden–Romania BIT by failing to enforce its tax laws in a consistent manner and thereby fostered the growth of a substantial illegal spirits market. The tribunal dismissed this claim.

4 *AMF v. Czech Republic*, Final Award, PCA Case No. 2017-15, 11 May 2020 at [700].
5 id. at [703].
6 id. at [704].
7 id. at [707].
8 id. at [707].
9 id. at [708].

The claimants argued that there was a denial of its legitimate expectations that Romania would enforce its alcohol tax laws. The tribunal accepted that such expectations need not arise from specific representations and could instead arise from a state's acts or conduct. However, the acts or conduct relied upon by the claimants were either acts of general legislation or specific actions taken by Romania relating to the enforcement of its taxation legislation,[10] and the tribunal had difficulty finding sufficient precision in this alleged expectation that would give it some clear content to which liability could be attached.[11] The tribunal considered that an expectation that a state would enforce its laws was of a high degree of generality, and the claimants did not provide a standard against which their expectation of adequate enforcement could be assessed.[12] Ultimately, the claimants' evidence for the alleged failure of enforcement rested largely on inference from their allegations about black market sales.[13]

While the tribunal accepted that there may be circumstances in which a failure to enforce laws could amount to a denial of legitimate expectations and hence a breach of the FET obligation, it distinguished the present case from previous cases to this effect:

a In *GAMI v. Mexico* (UNCITRAL, Final Award (15 November 2004)), it was recognised that a failure to enforce regulations could amount to a violation of NAFTA Article 1105 if it 'amounted to an "outright and unjustified repudiation" of the relevant regulations'. However, there was no such outright and unjustified repudiation in the present case, as the Romanian government had a structure and budget in place for alcohol tax enforcement and carried out investigations and prosecutions.[14]

b In *Zelena v. Serbia* (ICSID Case No. ARB/14/27), it was found that there was a 'manifest, systematic and sweeping lack of application of Serbian legislation' relating to the treatment of hazardous animal by-products, which denied the claimant's legitimate expectations of 'serious and visible efforts at the implementation and enforcement of the relevant law'. However, for the same reason above, the tribunal accepted that Romania here had engaged in serious and visible efforts in its law enforcement.[15] Further, unlike the Zelena case, there was no evidence that the claimants here had engaged in due diligence to confirm their subjective expectations.[16]

Given its finding that Romania had not failed to enforce its tax laws, the tribunal consequently dismissed the claimants' other arguments that Romania had breached the FET standard by failing to provide a stable and consistent legal framework and business environment, failing to act in good faith, or taking discriminatory and unreasonable measures.

iii Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, Final Award, PCA Case No. 2016-07, 21 December 2020

The tribunal found that India had breached the FET standard under the India–United Kingdom BIT by imposing a retroactive tax burden on certain 2006 transactions where a third party acquired a company, CIHL, from the claimant, Cairn.

10 id. at [362].
11 id. at [364].
12 id. at [364].
13 id. at [365].
14 id. at [368].
15 id. at [370].
16 id. at [363]; [369].

Cairn argued that a 2012 amendment to India's tax law effectively created a retroactive tax burden.[17]

India argued that the tax imposed was justified under law in 2006 even without the 2012 amendment, as the transaction was tax-avoidant in nature and entailed indirect transfer of immovable property. In any case, the amendment merely clarified existing law and did not create a new tax burden.[18]

The tribunal held that the 2012 amendment was in essence the basis for the fiscal measures India imposed.[19] That India labelled it as a 'clarification' was not decisive, and the tribunal had to objectively ascertain if the 2012 amendment substantively expanded the scope of Section 9(1)(i) of India's Income Tax Act.[20] Having considered legislative history, tax advice the claimant received, decisions of the Indian courts and other factors, the tribunal concluded that the 2012 amendment substantively changed the scope or operation of Section 9(1)(i), imposing a new tax burden where none previously existed.[21] Prior to the 2012 amendment, there was compelling evidence that Section 9(1)(i) did not apply to indirect transfers.[22] The timing of the taxation for the acquisition of CIHL was, in the tribunal's view, confirmation that indirect transfers were not taxable when the acquisition took place,[23] and the Income Tax Appellate Tribunal itself took the view that the taxation was imposed by the 2012 Amendment.[24] In addition, the Indian Supreme Court had decided that Section 9(1)(i) prior to the 2012 Amendment did not apply to indirect transfers.[25]

Because the Income Tax Act 1961 provided that tax authorities contained a limitation period of six years, the 2012 amendment permitted pursuing transactions after 1 April 2006, which thus caught the transactions in dispute that occurred between October and December 2016.[26]

While the tribunal found that India was permitted to raise a defence of tax avoidance,[27] and that the applicable standard was found in Indian law,[28] the tribunal rejected the argument that the 2006 transactions were tax avoidant as they were not structured with the dominant purpose of avoiding an applicable tax in India.[29] Rather, there were valid business reasons for how the transactions were structured,[30] such as regulatory or legitimate commercial reasons

17 *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, Final Award, PCA Case No. 2016-07, 21 December 2020 at [1016].

18 id. at [1017].

19 id. at [1060].

20 id. at [1063].

21 id. at [1250].

22 id. at [1100].

23 id. at [1185].

24 id. at [1203].

25 id. at [1227].

26 id. at [1258]–[1259].

27 id. at [1282].

28 id. at [1298].

29 id. at [1455], [1481], [1518] and [1528] in relation to 'Plan A' of implementing the initial public offer, [1536] in relation to 'Plan B'. [1558] in relation to 'Plan C' as eventually adopted by parties to the 2006 transactions.

30 id. at [1470].

and the structure chosen was legitimate and not artificial. While the tribunal recognised that tax implications may have played a role in how the 2006 transactions were structured, evidence did not support a finding that tax avoidance was Cairn's dominant purpose.[31]

India's defence that the 2006 transactions involved an indirect transfer of immovable property was not raised before tax assessment proceedings previously.[32] In any event, on the merits, the tribunal found that India failed to establish this alternative ground of taxation.[33] Among others, there was no evidence that India had previously ever taxed indirect transfers of immovable property in this manner,[34] and such taxation was not supported by the relevant provisions of the Income Tax Act.[35]

As to the merits of Cairn's claim for breach of the FET standard, the tribunal found that retroactive taxation was not in pursuance of any specific public purpose, violated legal certainty, and therefore was in breach of the FET standard.[36] Whether retroactive taxation was permissible in India was not determinative of the position at international law.[37] The tribunal noted that the FET standard is autonomous and not limited to the minimum standard of treatment,[38] and a state may breach the FET standard by conduct that is arbitrary, unreasonable, discriminatory, involves a lack of due process or a denial of justice, or is otherwise grossly unfair or unjust. The state may also breach its FET obligation if it undermines the principles of reasonable stability or predictability or in violation of the investor's legitimate expectations.[39] With reference to the principles of legal certainty, stability and predictability,[40] the tribunal carried out a balancing exercise between India's public policy objectives, on the one hand, and the claimant's interest in benefitting from the values of legal certainty and predictability, on the other. The tribunal held that laws should generally apply prospectively, and any individual is entitled to assume that the state will not legislate retroactively even absent a specific commitment.[41]

In conclusion, the tribunal awarded Cairn more than US$1.2 billion in damages, and also costs and interests.[42]

iv Mohamed Abdel Raouf Bahgat v. Egypt, Final Award, PCA Case No. 2012-07, 23 December 2019

The claimant brought claims under both the 1980 and 2004 Egypt–Finland BITs, and claimed that Egypt had breached the FET standard in both.

The tribunal held that FET is an autonomous standard generally guaranteeing the rule of law in the treatment of foreign investors under the legal systems of host states, comprising,

31 id. at [1564], [1570].
32 id. at [1628].
33 id. at [1632].
34 id. at [1633d].
35 id. at [1635]–[1645].
36 id. at [1816], [1823].
37 id. at [1688].
38 id. at [1704].
39 id. at [1726].
40 id. at [1757].
41 id. at [1789].
42 id. at [2032].

among others, protection of legitimate expectations, absence of bad faith, and requiring that state conduct be transparent, consistent and non-discriminatory and not based on unjustifiable distinctions or arbitrary.[43]

In relation to Article 2(1) of the 1980 BIT, the tribunal rejected Egypt's interpretation of the FET obligation as only requiring the minimum standard of treatment or prohibiting denial of justice.[44] The tribunal took the view that measures taken against the claimant and his companies (including his arrest and freezing the assets of his companies) were disproportionate. While the tribunal held that the claimant had not shown that measures against him were motivated by malice, the claimant had been a victim of a denial of justice.[45] This was notwithstanding that the claimant was eventually acquitted of the crime he had been charged with.

The tribunal noted that Egypt's Supreme State Security Court had itself found that the claimant's arrest, prosecution and incarceration lacked probable cause, were performed arbitrarily, in bad faith, and in wilful disregard of due process. Indeed, the Supreme State Security Court had criticised the lower court for convicting the claimant in a manner contrary to the basic expectation from a functioning justice system. On the facts, the claimant's arrest had been premature and the prosecution had also disregarded evidence that showed there was no probable cause against the claimant.[46]

In relation to Article 2(2) of the 2004 BIT, which could only cover acts or omissions after the 2004 BIT entered into force, the tribunal found there had been a breach of FET as the claimant remained imprisoned till March 2003 even after his acquittal in June 2002, was subject to a travel ban till June 2005, and his assets remained frozen until October 2006. The claimant's companies' assets continued to be frozen, and he was denied access to the project site. The tribunal held that Egypt had not justified why limitations on the claimant and his investment were not lifted, and that there was no evidence such treatment of an accused person, who had been acquitted, was normal under Egyptian law. That the claimant might have had access to alternative funds or that an inability to travel may not have affected the investment, as Egypt argued, was irrelevant.[47]

v The PV Investors v. The Kingdom of Spain, Final Award, PCA Case No. 2012-14, 28 February 2020

This was yet another award involving allegations that Spain's reform of its renewable energy sector in 2010–2014 had fallen short of its FET obligations under Article 10(1) of the Energy Charter Treaty.[48]

Insofar as the FET standard is concerned, the key dispute turned on what legitimate expectations the claimants (comprising 25 corporate entities and one natural person) had in the circumstances, which is encompassed by and protected by a state's FET obligations. These circumstances included Royal Decree (RD) 661/2007, which provided the claimants with

43 *Mohamed Abdel Raouf Bahgat v. Egypt*, Final Award, PCA Case No. 2012-07, 23 December 2019 at [246].

44 id. at [247].

45 id. at [248]–[249].

46 id. at [252]–[255].

47 id. at [280]–[281].

48 See *The PV Investors v. The Kingdom of Spain*, Final Award, PCA Case No. 2012-14, 28 February 2020 at [551]–[555].

economic incentives, and various representations and public statements of Spain, and which the claimants alleged had led to them investing around €2 billion in the Spanish photovoltaic sector.

In summary, the claimants had advanced two alternative positions. Their primary position was that Spain's reforms had frustrated their reasonable and legitimate expectation that the incentives set out in RD 661/2007 would remain for the lifetime of their plants.[49] In the alternative, the claimants argued that there was at least a legitimate expectation that they were entitled to a reasonable rate of return, and Spain's conduct had caused their return to fall short of this.[50]

The award rendered by the majority found, having considered awards from earlier-concluded arbitrations on similar claims against Spain, that the claimants could only have legitimately expected to receive a reasonable return on their investments (i.e., the alternative position), and Spain had frustrated this with respect to 10 of the claimants (and due to pay €91.1 million in total). In this regard, the following points bear mention with respect to the nature of the legitimate expectations found by the tribunal:

a First, the majority found that the cardinal principle of the entire Spanish regulatory framework was only that of 'reasonable profitability or the guarantee of a reasonable rate of return for investors [such as the claimants'.[51] This included the 'legislative centerpiece' of the regulatory framework (i.e., Spain's Law 54/1997 on the Electricity Sector) and also RD 661/2007 itself, which 'stressed the principle of reasonable profitability' in its preamble (and which the claimants sought to rely on).[52]

b Second, the majority specifically disagreed with the claimants' argument that Spain had provided stabilisation commitments in RD 661/2007 elsewhere. In particular, while the claimants had tried to rely on Article 44.3 of RD 661/2007 as a stabilisation commitment,[53] the majority found that the mere statement in Article 44.3 that 'that certain revisions that may occur in the future under that decree would not affect existing installations' was not a guarantee by Spain that future legislative or regulatory changes would not affect investments.[54] This was because: (1) changes in the regulatory framework since its inception in 1997 made it evident to any reasonable operator in the photovoltaic sector that it was subject to evolving technological and economic circumstances; and (2) the reasonable expectation of such changes was also confirmed by the Spanish Supreme Court in various rulings over the years.[55]

c Last, and bearing in mind that the entire Spanish regulatory framework only gave rise to an expectation of reasonable profitability, the majority found that the other alleged representations or assurances by Spain did not change the position that was evident from the regulatory framework (especially because such entities were not empowered to change the regulatory framework).[56]

49 id. at [213]–[214].

50 id. at [215]–[216]. It bears mention that this alternative position came about in response to Spain's contention that the claimants were only entitled to a reasonable rate of return.

51 id. at [596].

52 id. at [587]–[596] (and especially [590] and [595]).

53 See id. at [599] (which sets out Article 44.3 of RD 661/2007).

54 id. at [601].

55 id. at [601]–[611].

56 id. at [614]–[615].

Interestingly, the dissenting arbitrator disagreed with the majority on the nature of the legitimate expectations which ought to have been found, and consequently the amount Spain ought to have been ordered to pay (i.e., up to €540.9 million more).[57] In this regard, the dissenting arbitrator noted that the majority's decision was inconsistent with the line of 11 of 18 earlier known awards involving the same treaty, same respondent state (i.e., Spain), and same measures which: (1) found for the claimants in those cases on the basis of the equivalent of the primary claim here (i.e., a legitimate expectation that the incentives set out in RD 661/2007 would remain for the lifetime of their plants); and (2) he held were not credibly distinguishable from the present case.[58] The dissenting arbitrator also found that the remaining seven of those 18 known awards were distinguishable, whether on the basis of them involving investments in different renewable energy sectors, or with different material times being considered, or otherwise.[59]

This award, the concurring and dissenting opinion, as well as the line of earlier awards referred to, is yet another example of how the consideration of breaches of FET can be a risky exercise: different tribunals (or even different persons on the same tribunal) can take different views on similar factual circumstances.

vi Thomas Gosling and others v. Republic of Mauritius, Award, ICSID Case No. ARB/16/32, 18 February 2020

The claimants (four corporate entities and one natural person) claimed against Mauritius in respect of their investments in two real estate and tourism developments in Mauritius: one in Le Morne (which was subsequently inscribed as a UNESCO world heritage site) and one at the salt-water lagoons of Pointe Jerome (whose lease was not extended and instead subsequently terminated). The claimants made various claims on the basis of the 1986 Mauritius–United Kingdom BIT, including that Mauritius's conduct amounted to an indirect expropriation and was a breach of the FET obligation in Article 2(2) of the UK–Mauritius BIT.

Insofar as the FET claim was concerned, the majority explained that it did not consider there to be a comprehensive definition of the FET standard, but that it understood FET to 'mean treatment that objectively will be considered just by an impartial observer bearing in mind the circumstances'.[60] The majority then considered that there had been no denial of FET, whether with respect to the Le Morne or Pointe Jerome developments.[61]

For the Le Morne development, the majority rejected the claimants' contentions that there had been a frustration of the claimants' legitimate expectations, inconsistent and unpredictable treatment of their investment, or a failure to act in good faith.[62] In particular, the majority considered that the claimants had always been aware that Mauritius intended to inscribe Le Morne as a UNESCO site, and was entitled to change its policy in respect of development of Le Morne and had never given any assurance that it would not change it. This was especially because a letter of intent from the Mauritius government (which the

57 *The PV Investors v. The Kingdom of Spain*, Final Award (Concurring and Dissenting Opinion of Charles N. Brower), PCA Case No. 2012-14, 28 February 2020 at [1].

58 id. at [3], [5].

59 id. at [6]–[11].

60 *Thomas Gosling and others v. Republic of Mauritius*, Award, ICSID Case No. ARB/16/32, 18 February 2020 at [243]–[246].

61 id. at [247]–[250] and [262]–[272].

62 id. at [247]–[250].

claimants had relied on) had expired without the claimants having fulfilled its conditions. This included obtaining necessary permits for the development, which were still not obtained more than a year after its expiry. Furthermore, the majority considered that the Mauritius government had been consultative throughout the process, and that disagreement with the claimants' position did not amount to the Mauritius government being non-consultative.

As for the Pointe Jerome development, the claimants' arguments on the breach of the FET standard alleged a difference of treatment, unlawful cancellation and lack of due process. However, the tribunal disagreed as, among other things:

a the claimants had invested in the project knowing that it depended on a lease whose construction commencement deadline was expiring within two months;

b the lease's last extension had been labelled 'final';

c under the terms of the lease, failure to commence construction could be cause for cancellation; and

d not only had construction not been commenced by the deadline, but the claimants had not obtained any of the required additional permits by the time the lease was cancelled.[63]

In short, the risk of cancellation of the lease was 'a risk the Claimants took, for which the Respondent is not liable'.[64]

In contrast, the dissenting arbitrator considered that Mauritius had violated the FET standard in Article 2(2) of the BIT with respect to both developments. On the Le Morne development, the dissenting arbitrator considered that Mauritius had breached the FET standard as, among other things, the claimants had relied on an official government policy and representations specifically made to them by the government to continue investing in the project.[65] As for the Pointe Jerome development, the dissenting arbitrator considered that even though Mauritius had the discretion not to grant the lease extension, Mauritius had breached the FET standard by exercising it 'in a non-transparent, unfair, arbitrary, and discriminatory manner'.[66] Among other things, this was because there was a contrast between the manner in which the lease had been cancelled and what might have been expected: the entire decision comprised 'two hand-written sentences' without any 'discussion, justification, reasoning, or analysis whatsoever', and Mauritius had not involved the claimants in the process.[67]

vii Spółdzielnia Pracy Muszynianka v. Slovak Republic, Award, PCA Case No. 2017-08, 7 October 2020

In this case, the tribunal considered the content of the 'autonomous' FET standard. While the tribunal found a breach of the standard, causation was not established and thus the claimant did not receive compensation.

The claimant, Muzynianka spolka z ograniczona odpowiedialoscia, was in the business of producing highly mineralised water. In 2012, the claimant acquired GFT Slovakia, a

63 id. at [262]–[272], especially [270].

64 id. at [272].

65 *Thomas Gosling and others v. Republic of Mauritius*, Award (Dissenting Opinion of Arbitrator Alexandrov), ICSID Case No. ARB/16/32, 18 February 2020 at [2]–[28], and [45], especially [19], [24]

66 id. at [29]–[44], and [45].

67 id. at [29]–[44], especially at [36], [39], [42].

Slovak subsidiary of a Polish company active in the mineral water production and bottling sector. GFT Slovakia had some years prior to the acquisition carried out hydrogeological exploration activities in the Legnava region of the Slovak Republic to determine sources of mineral water and made plans to exploit those sources. Permit applications were made to the various governmental authorities in the state in preparation for carrying out those plans. One iteration of GFT Slovakia's plans to exploit the mineral water resource was to pipe extracted mineral water to neighbouring Poland for bottling.

On 10 March 2012, the Slovak Social Democratic Party won the national elections with a historic majority in Parliament. On 21 October 2013, a draft constitutional amendment was approved by a qualified majority banning the transport of water taken from water bodies located in the territory of the Slovak Republic across the border. The ban, however, excluded the export of water for personal consumption and mineral water packed in the Slovak Republic, among other things.

GFT Slovakia's application for an exploitation permit was denied.

The claimant contended that the constitutional amendment and denial of the exploitation permit constituted unfair and inequitable treatment, among other substantive breaches. The Tribunal considered that FET standard provided for in the Poland–Slovak Republic BIT reflected the 'autonomous' FET standard and was not confined to the customary international law minimum standard of treatment.[68]

Unlike some other treaties, the BIT in question did not refer to the 'international minimum standard' or similar wording.[69]

Irrespective of the difficulty of capturing the elusive essence of FET, and the nuances in the formulation of each standard by each tribunal, there is a common understanding of the core elements of FET among tribunals. 'Autonomous' FET provisions have been deemed to protect against state conduct that frustrates an investor's reasonable and legitimate expectations, or that is otherwise contrary to the minimum standard of treatment, unreasonable, discriminatory, disproportionate, or overall lacking in good faith, due process, transparency and consistency.[70]

In respect of the scope of protection of the investor's legitimate expectations, the tribunal enunciated the following components:

a To qualify as legitimate, the investor's expectations must be based on assurances: (1) given by the state to encourage the making of the investment; (2) addressed specifically to the investor; and (3) that are sufficiently specific in content. In addition, an investor must establish that it placed reliance upon the assurance.[71]

b Absent specific assurances, the FET does not protect expectations in relation to the stability of a state's legal framework, at least when the legal framework was not adopted to attract foreign investments. States are free to modify the legal regime applicable at the time of the investment to the extent they do so within the limits prescribed by FET. Further, legitimate expectations cannot arise from the general legal framework of a state.[72]

68 *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, PCA Case No. 2017-08 (7 October 2020), Award, [459].

69 ibid.

70 id. at [461].

71 id. at [466].

72 id. at [463]–[466].

c The expectation must emanate from a source that is competent to provide the assurance.[73]

d The fact that the investor omits to provide information on its investment plans when asked rules out the creation of legitimate expectations.[74]

e The relevant point in time for the assessment of legitimate and reasonable expectations is the time at which the investment was made. Investors cannot base their legitimate expectations on assurances made post-investment. The relevant investment is the claimant's acquisition of GFT Slovakia in 2012. As to the alleged representations made by the state prior to the claimant acquiring GFT Slovakia, the tribunal held that in principle, the claimant could rely on these statements on the basis that they were made available to the claimant before it acquired GFT Slovakia.[75]

The tribunal held that there was no breach in the claimant's legitimate expectations. In respect of the other aspects of the FET standard (discrimination, arbitrariness, etc.), the tribunal held that the promulgation of the constitutional amendment did not breach the BIT. That said, the conduct of the administrative proceedings on GFT Slovakia's application for the exploitation permit breached the FET standard. However, opining that the claimant would have incurred the losses claimed even without that breach, the tribunal ultimately found a lack of causation and declined to award any damages.

One of the arbitrators issued a partial dissent, expressing the view that the constitutional amendment was also a breach of the FET standard on the basis of discrimination, arbitrariness and unreasonableness, among others.[76]

viii Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (II), Award, PCA Case No. 2015-32, 20 August 2019[77]

The claimants were in the business of exploiting rare earth elements. The claimants took the position that the Kyrgyz Republic had implemented a series of cumulative and interconnected measures that deprived the claimants of the use and control of certain licence granted to mine rare earth elements. This, according to the claimants, constituted expropriation and inequitable and unfair treatment.[78]

The claims were brought pursuant to a domestic piece of legislation in the Kyrgyz Republic, the Kyrgyz Republic No 66 On Investments in the Kyrgyz Republic dated 27 March 2003 (2003 Investment Law). Thus preliminarily, the tribunal had to decide on the applicability of general international law, and whether the jurisdiction of the tribunal was confined to the substantive provisions of 2003 Investment Law or included international law. In this connection, the tribunal held that its jurisdiction was not so limited and that

73 id. at [481] and [496].

74 id. at [493].

75 id. at [472]–[474].

76 *Spółdzielnia Pracy Muszynianka v. Slovak Republic*, Partial Dissenting Opinion of Professor Robert G Volterra, [20] and [94].

77 While this was award was issued on 20 August 2019 (and should thus technically be outside the time period covered by this chapter), we have covered this as it only surfaced in mid-2020 in the context of enforcement proceedings stated before the US courts by the claimants' funder.

78 *Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (II)*, Award, PCA Case No. 2015-32, 20 August 2019, [13].

where appropriate, general international law would form part of the applicable law. That said, the interpretation and application of the provisions of the 2003 Investment Law and other Kyrgyz legislation formed the core of the arbitration.[79]

On the applicable FET standard, the issue was whether Article 4(4) of the 2003 Investment Law, under which the claimants brought its claims, provided for the FET standard. Article 4(4) made no express reference to the FET standard but instead employed terms such as 'national treatment', 'discrimination' and 'interference'.[80]

The tribunal considered that it did not have to consider whether Article 4(4) provided for the FET standard to determine if Article 4(4) had been breached. In this regard, in interpreting the words of Article 4(4), the tribunal considered a decree issued by the new government of the Kyrgyz Republic, which expressly stated that foreign and domestic investors shall be guaranteed and shall continue to enjoy a fair and equitable legal regime, to be relevant. The tribunal, however, declined to decide whether the words 'a fair and equitable legal regime' had to be interpreted as identical with the FET standard found in investment treaties.[81]

On the tribunal's analysis, having found expropriation to have been made out, the tribunal found that the conduct of the respondent was inconsistent with the promise of a 'fair and equitable legal regime, including guarantees of protection of . . . investments' as according to the respondent's own decree and thus a breach of Article 4(4) of the 2003 Investment Law.[82] In view of this conclusion, the tribunal declined to enter into a detailed discussion.[83]

The tribunal further declined to make findings on the issue of arbitrariness as neither party requested for other or additional relief on the basis of such a breach.[84]

79 id. at [386]–[387].

80 id. at [623]–[624].

81 id. at [630]–[632].

82 id. at [646].

83 id. at [647].

84 id. at [656].

Appendix 1

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